ONG AH KOOI

v.

PUBLIC FINANCE BHD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[BANKRUPTCY NO. 29-665-90]
26 SEPTEMBER 1991

BANKRUPTCY: *Bankruptcy notice - Judgment debtor in Australia - Substituted service - Whether Court has jurisdiction - Amount stated in bankruptcy notice in excess of the actual debt owing - No conclusive evidence of judgment debtor being in Australia - Effect of donee of a power of attorney affirming affidavit - Bankruptcy Act 1967, s. 3(2)(ii) - Bankruptcy Rules 1969, rr. 95, 110, 113.*

A bankruptcy notice which was founded on a judgment sum of RM6,993,372.59 was served by way of substituted service as the judgment debtor was in Australia. The judgment debtor sought to set aside the bankruptcy notice on the grounds firstly, that the Court did not have power to deal with a judgment debtor abroad and secondly, that the amount stated in the bankruptcy notice was in excess of the acutal debt owing.

It was argued by the judgment creditor that since the deponent of the relevant affidavit to set aside the bankruptcy notice was not the judgment debtor but the donee of a power of attorney given by the judgment debtor, the relevant power of attorney should be produced; otherwise, there was no conclusive evidence that the judgment debtor was still in Australia.

Held:

[1] The application for substituted service had been made correctly and it shall be deemed to have been duly served on the judgment debtor as no one could have known that the judgment debtor was in Australia at the relevant time.

[2] Rule 113 of the Bankruptcy Rules 1969 makes it clear that where a debtor petitioned against is not in the federation, the Court may order service within such time and in such manner and form as it thinks fit.

[3] The amount stated in the bankruptcy notice is correct since it was issued about a month before the auction. Therefore, the objection of the judgment debtor must fail, especially so under s. 3(2)(ii) of the Bankruptcy Act 1967.

[4] Apart from the brevity of the relevant affidavit, no details or conclusive evidence of any kind as regards the judgment debtor's Australian residence has been produced. Therefore the donee's affidavit should be rejected on the grounds of hearsay.

[Judgment debtor's application dismissed with costs.]

Cases referred to:

Algemene Bank Nederland NV v. Loo Choon Yow [1989] 2 CLJ (Rep) 846 ***(foll)***
Re Dato' Loh Fook Yen, ex-parte Malayan United Finance Bhd. [1989] 1 CLJ (Rep) 453 ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(2)(ii)
Bankruptcy Rules 1969, rr. 95, 110, 113

Other Sources referred to:
Stroud's Judicial Dictionary PP 974 & 975

For the judgment creditor - Low Kim Leng; M/s. Soo Thien Ming & Shahrizat
For the judgment debtor - Chan Kok Keong; M/s. Chan & Associates
For the official assignee - Halimah binti Haroon

JUDGMENT

Abdul Malek Ahmad J:

The relevant bankruptcy notice founded on the judgment on 27 April 1988 in Ipoh High Court Civil Suit No. 23-264/87 for RM6,993,372.59 sen had been issued on 24 April 1990 and served on the judgment debtor by way of substituted service on 12 November 1990 and 21 November 1990 respectively at the judgment debtor's last known address and by way of posting on the notice board of the Ipoh High Court. Pursuant to R. 95 of the Bankruptcy Rules 1969 (hereinafter the Rules), an affidavit had been filed on 18 June 1991 to set aside the said bankruptcy notice.

It is worthwhile and necessary to reproduce the said affidavit:

[Affidavit On An Application To Set Aside Bankruptcy Notice]

I, Ong Kui Eng [IC No. 1082717] of 3119, Jalan Sungai Nibong, Teluk Intan, Perak affirm to and say as follows:

1. That I am the holder of Power of Attorney registered as PA 422121 for the above named judgment debtor.
2. That the said judgment debtor has been resident in Australia since 25 November, 1989.
3. That I understand from the said judgment debtor's solicitors that the Bankruptcy Notice No. 29-665 of 1990 has been issued by this Honourable Court but yet to be served on the judgment debtor.
4. That I am advised by the said solicitors and verily believe that the sum stated in the bankruptcy notice that is RM 6,993,372.59 is wrong.
5. That I am also advised by the solicitors that the judgment creditor was at all material times a secured creditor who has, in fact, on 26 May, 1990 realised their security by auctioning the land charged to them. In the circumstances, the judgment sum stated in the bankruptcy notice should have been reduced by the amount obtained from the said sale which I am told by the auctioneers was RM3,000,001.

The essence of the learned Counsel for the judgment debtor's arguments before me based on the said affidavit centred on two issues. One was that the service was not valid as the judgment debtor had been residing in Australia since 25 November 1989 and was therefore out of the Court's jurisdiction and the other was that the amount stated in the bankruptcy notice was in excess of the actual debt owing.

Learned Counsel had contended that the application for substituted service as provided for under r. 110 of the Rules had been wrongly applied for in the circumstances and that the Court had no power to make any bankruptcy order against any person residing abroad. It is pertinent therefore to examine the affidavit of non-service supporting the application for substituted service of the bankruptcy notice the relevant excerpts of which reads:

2. I did on 17 May 1990 at about 10.00 a.m. personally attend at Lot 4.01, Wisma Central, 50450 Kuala Lumpur with a true copy of the bankruptcy notice and request for issue of bankruptcy which was dated 24 April 1990 on the judgment debtor but I was informed by one Chinese girl that the said judgment debtor was not in.

3. On 18 May 1990 at about 11.30 a.m., I attempted to serve the bankruptcy notice and request for issue of bankruptcy notice on the above named judgment debtor at No. Lot 4.01, Wisma Central, 50450 Kuala Lumpur but could not find him in the said premises.

4. On 21 May 1990 my employers, Messrs. Kam Woon Wah & Co., sent a letter of appointment to the abovenamed judgment debtor at Lot. 4.01, Wisma Central, 50450 Kuala Lumpur and I made my last attempt to serve the bankruptcy notice and request for issue of bankruptcy notice but still could not find him in the said premises.

In these circumstances, my view was that the application for substituted service had been made correctly, and accordingly under that same rule, it shall be deemed to have been duly served on the judgment debtor. It goes without saying that no one then could or would have known that the judgment debtor was in Australia at the relevant time until this affidavit to set aside the bankruptcy notice was filed at a much later stage.

As for the Court having no power to deal with a judgment debtor residing abroad and that these proceedings should take place in Australia, I must disagree with the judgment debtor's learned Counsel viewpoint since r. 113 of the Rules makes it clear that where a debtor petitioned against is not in the Federation, the Court may order service within such time and in such manner and form as it thinks fit.

With regard to the excess amount, the judgment debtor is not exactly quarrelling over the original debt but in maintaining that since the land in question had been auctioned on 26 May 1990 for about three million ringgit, the amount had been reduced to about half. The branch manager of the judgment creditor has not disputed this but had stated that the land does not belong to the judgment debtor and in any case there was still another three million ringgit in arrears due from the judgment debtor. However, my view is that the amount stated in the bankruptcy notice is correct since it was issued about a month before the auction. On ground, therefore, the objection of the judgment debtor must fail especially so since s. 3(2)(ii) of the Bankruptcy Act 1967 which states:

> that a bankruptcy notice...shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due...

Cannot apply in this situation since the amount specified in the bankruptcy notice dated 24 April 1990 was correct at the date of issue. In any case, even if I am held to be in error, the notice by the judgment debtor under that same provision is out of time as has been held in *Re Dato' Loh Fook yen, ex-parte Malayan United Finance Bhd.* [1989] 1 CLJ (Rep) 453.

Learned Counsel for the judgment debtor had also made a mountain of the fact that the relevant order on which the bankruptcy notice is based stated that "the plaintiff be at liberty to sign final judgment in the action against the defendant". This to him does not mean it is a final judgment but as pointed out by learned Counsel for the judgment creditor this is actually splitting hairs. To my mind, even Stroud's Judicial Dictionary at pp. 974 and 975 on the meaning of "final judgment" is against learned Counsel for the judgment debtor, who was the one who had made references to it, since among things it states that it is a final judgment if no further step is necessary to perfect the said order and that even the judgment of a Court of summary jurisdiction in favour of a creditor is a final order. The nail on the head is further hit completely by reference to the bankruptcy notice itself which had referred to the said order as "being the amount due on a final judgment".

Learned Counsel for the judgment creditor had argued that the deponent of the relevant affidavit is not the judgment debtor and, being the donee of the power of attorney given by the judgment debtor, should have produced the relevant power of attorney. As such, there was no conclusive evidence that the judgment debtor was and still is in Australia. He had referred me to the Singapore case of *Algemene Bank Nederland NV v. Loo Choon Yow* [1989] 2 CLJ (Rep) 846 which had dealt with the same issue of domicile and where the High Court had held:

> The affidavits of the judgment debtor's witnesses were rejected on the grounds that they were hearsay. Whether the judgment debtor had changed his domicile was a matter within the personal knowledge of himself, so the witnesses could not say that they had personal knowledge of this matter.
>
> As regards the statements that the judgment debtor had married a Taiwanese lady, had a son and purchased a house in Taiwan with the intention of residing there permanently, no documentary evidence was produced to show any of these facts.
>
> The judgment debtor's passport showed that he had travelled extensively to many countries from 1985 to 1988. But frequency of travel does not prove a change of domicile nor did the judgment debtor himself so allege.

I must say that I am in full agreement with the findings in that case which was on a stronger footing than the facts of this case since the judgment debtor's passport there was also produced. In the instant case, apart from the brevity of the relevant affidavit, no details of any kinds as regards the judgment debtor's Australian residence has been produced and in view of this considered together with the other factors dealt with earlier, I had no qualms in dismissing the application with costs.

Also found at [1992] 1 CLJ 177